

Rule 15.1. Briefs and Oral Argument in a National Labor Relations Board Proceeding

~~In either an enforcement or a review proceeding, a party adverse to the National Labor Relations Board proceeds first on briefing and at oral argument, unless the court orders otherwise.~~

Rule 16. The Record on Review ~~or Enforcement~~

(a) Composition of the Record. ~~The record on review or enforcement~~ of an agency order consists of:

- (1) the order involved;
- (2) any findings or report on which it is based; and
- (3) the pleadings, evidence, and other parts of the proceedings before the agency.

(b) Omissions From or Misstatements in the Record. The parties may at any time, by stipulation, supply any omission from the record or correct a misstatement, or the court may so direct. If necessary, the court may direct that a supplemental record be prepared and filed.

Rule 17. Filing the Record

(a) ~~Agency to File; Time for Filing; Notice of Filing.~~ ~~The agency must file the record with the circuit clerk within 40 days after being served with a petition for review, unless the statute authorizing review provides otherwise, or within 40 days after it files an application for enforcement unless the respondent fails to answer or the court orders otherwise. The court may shorten or extend the time to file the record. The clerk must notify all parties of the date when the record is filed.~~

(b) Filing — What Constitutes.

- (1) The agency must file:
 - (A) ~~the original or a certified copy of the entire record or parts designated by the parties; or~~
 - (B) a certified list adequately describing all documents, transcripts of testimony, exhibits, and other material constituting the record, or describing those parts designated by the parties.
- (2) ~~The parties may stipulate in writing that no record or certified list be filed. The date when the stipulation is filed with the circuit clerk is treated as the date when the record is filed.~~
- (3) The agency must retain any portion of the record not filed with the clerk. All parts of the record retained by the agency are a part of the record on

Rule 17. Filing the Record.

(a) Retaining the Record; Sending the Certified List. The agency must retain the record and send to this court a certified list or index, unless this court, on motion or sua sponte, orders otherwise.

(b) Certified List or Index.

- (1) **From the Patent and Trademark Office.** No later than 40 days after receiving the notice of appeal, the Commissioner must send to the clerk the certified list and a copy of the decision or order appealed. This constitutes compliance with the requirement of 35 U.S.C. § 143 and 15 U.S.C. § 1071(a)(3) for sending a certified record to the court.
- (2) **From Another Agency.** No later than 40 days after the court serves a petition or notice of appeal on an agency, the agency must send to the clerk the certified list or index and a copy of the decision or order being appealed.
- (3) **Index of VA Rulemaking Record.** In petitions for review under 38 U.S.C. § 502, if a petitioner has not adequately identified the rulemaking proceeding complained of, so that the Secretary of Veterans Affairs cannot send the certified list or index within the time provided in Federal Circuit Rule 17(b)(2), the Secretary must promptly move to waive or extend the time for filing the certified list or index.

FEDERAL RULES OF APPELLATE PROCEDURE

review for all purposes and, if the court or a party so requests, must be sent to the court regardless of any prior stipulation.

FEDERAL CIRCUIT RULE

(c) Service of Certified List or Index by Agency. When it sends a certified list or index to the clerk, the agency must simultaneously serve a copy on the parties and provide a certificate of service to the clerk. Service must be made on counsel for the appellant or petitioner who has served the agency with a copy of an entry of appearance in this court; otherwise, service must be made on counsel who appeared before the agency or, if none, on the party. This service constitutes notice to the parties of the date the record was filed.

(d) Access of Parties and Counsel to Original Record.

(1) Material Not Subject to a Protective Order; Inspection and Copying. When a petition for review or notice of appeal is filed, the agency must permit a party or counsel for a party to inspect and copy the nonconfidential original papers, transcripts, and exhibits to prepare the appendix. This inspection and copying is subject to reasonable regulation by the agency.

(2) Material Subject to a Protective Order; Inspection and Copying. A party or counsel for a party must be permitted to inspect and copy material contained in the record governed by a protective order of an agency in accordance with that order. If this court modifies or annuls the protective order, the access of a party or counsel is governed by the order of this court.

(e) Preserving a Protective Order on Appeal. Any portion of the record that was subject to a protective order in an agency remains subject to that order unless otherwise ordered.

(f) Agreement by Parties to Modify Protective Order; Certificate of Compliance. If any portion of the record in the agency is subject to a protective order and a petition for review or notice of appeal has been filed, each party must promptly review the record to determine whether protected portions need to remain protected on appeal. If a party determines that some portions no longer need to be protected, that party must seek an agreement with the other party. Any agreement that is reached must be promptly presented to the agency, which may issue an appropriate order. Whether or not an agreement is reached, each party must file a certificate of compliance within 45 days of docketing stating it complied with this rule.

(g) Motion to Modify the Protective Order. A party may move at any time in this court to modify a protective order to remove protection from some material or to include another person within its terms. This court may decide the motion or may remand the case to the agency. This court, sua sponte, may direct the parties to show cause why a protective order should not be modified.

Practice Note

Transcript of Agency Proceeding at Government Expense. These rules do not require an agency to provide a party with a written transcript at the agency's expense. Any party seeking a written transcript of a hearing should direct the request to the agency, not the court.

Agency. The term agency in these rules includes a board, commission, or arbitrator.

Rule 18. Stay Pending Review

(a) Motion for a Stay.

- (1) **Initial Motion Before the Agency.** A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order.
- (2) **Motion in the Court of Appeals.** A motion for a stay may be made to the court of appeals or one of its judges.
 - (A) The motion must:
 - (i) show that moving first before the agency would be impracticable; or
 - (ii) state that, a motion having been made, the agency denied the motion or failed to afford the relief requested and state any reasons given by the agency for its action.
 - (B) The motion must also include:
 - (i) the reasons for granting the relief requested and the facts relied on;
 - (ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and
 - (iii) relevant parts of the record.
- (C) The moving party must give reasonable notice of the motion to all parties.
- (D) The motion must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the

Rule 18. Stay Pending Review

(a) Petition for Review or Notice of Appeal; Agency Order.

A petition for review or notice of appeal must be filed with this court before it will entertain a motion for a stay pending review. A motion for stay pending review must be accompanied by a copy of the agency decision on the merits and a copy of any agency order on the motion for a stay pending review.

(b) Length of Motion, Response, and Reply; Copies; Briefs.

- (1) A motion or a response to a motion for a stay pending review may not exceed 20 pages. A reply may not exceed 10 pages,
- (2) An original and four copies of a motion response, or reply must be filed.
- (3) A separate brief supporting a motion, response, or reply is not permitted.

(c) Notice and Service When Requesting Immediate Action; Facsimile.

- (1) A party moving for a stay pending review who requests immediate action by the court must - before filing - all parties that a motion will be filed and must utilize an expedited method of service.
- (2) If a motion for stay pending review is sent to the court by facsimile transmission, a certificate of interest must be included, and opposing counsel must be served in the same manner. The filing must state the name, address, and, if applicable, the facsimile numbers of the persons served.